



Oxera response

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1.1	Substantive SMS assessment	3
1.2	Conduct requirements	6
1.3	Interaction with other areas of digital policy	9

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It has been widely recognised that there can be a gap between competition law and sectoral regulation in digital markets. In the UK, the purpose of the Digital Markets, Competition and Consumers Act 2024 (DMCCA) is to bridge the space between the UK competition regime (the 1998 Competition Act and the 2002 Enterprise Act) and sectoral regulation covering privacy (GDPR) and online harms (2023 Online Safety Act) applied by the ICO and Ofcom, respectively.

The DMCCA gives the CMA wide-ranging powers and the draft guidance is helpful, to a degree, in interpreting how the CMA intends to use those powers.

Oxera's response to the CMA's consultation covers three broad themes:

- the role of guidance and its impact, not just on enforcement but also on deterrence;
- the role of proportionality and effectiveness;
- the interlinkages with other market failures in digital markets, such as privacy and online harms.

The DMCCA as a deterrent

Most outcome-based regulation works through two mechanisms: an enforcement of the rules by the regulator on a case-by-case basis and a 'deterrent mechanism' whereby firms design products and services to avoid regulatory action and proactively comply with the rules. Designing and enforcing rules on each and every issue is going to be very complex, time-consuming and expensive for the CMA. The DMCCA will be more effective when the deterrent mechanism incentivises firms to design compliant products and services from the outset. However, for the deterrent mechanism to work, firms need to have a clear understanding of what the DMCCA is trying to achieve.

While we understand that the CMA does not want to constrain itself from being able to intervene where it considers it must in the future, particularly given the context of dynamic and evolving digital markets, we consider that, in places, additional guidance as to how the CMA intends to implement the DMCCA will help firms self-monitor and selfcomply. This is particularly so in relation to the open choices, and trust and transparency objectives, as we set out in more detail below (see section 1.2.1). Firms within scope of the DMCCA will have a strong incentive to proactively comply with the DMCCA and self-regulate; the risk of substantial fines and the potential need to re-design products and services, potentially even whole business models, will ensure this. More detailed guidance as to how the CMA will interpret the objectives of the conduct rules, and rules of thumb on what 'good outcomes' look like, will help firms achieve this aim.

Proportionality and effectiveness

The DMCCA provides some checks and balances to the scope of intervention—for example, by allowing for the reversal of designations and conduct requirements where appropriate, and the requirement for any Conduct Requirement (CR) or Pro-Competition Intervention (PCI) to meet a proportionality test. However, given the breadth of the scope for intervention, the draft guidance would benefit from more clarity about the types of assessments required. For example, how should a SMS-designated firm test whether its choice architecture is sufficiently open to allow 'open choices' while not confusing the consumer and leading to disengagement?

Importantly, as we discuss in section 1.2.2, there are likely to be tradeoffs between SMS-designated firms, business users, consumers and competitors. What is most effective for business users or competitors may not be proportionate for consumers. Guidance on how the CMA will make these trade-offs will help firms (both SMS-designated and not), consumer organisations and advisers engage constructively with the CMA.

The interaction of the DMCCA with other market failures, such as privacy and online harms

The DMCCA focuses on addressing the potential issue of market power in digital markets. It is well documented that digital markets can also suffer from other market failures: these include market failures relating to privacy (e.g. asymmetric information and behavioural biases) and online harms (e.g. negative externalities). These market failures are often dealt with via other legislation, such as GDPR, regulated by the ICO, and the Online Safety Act, enforced by Ofcom.

While competition can lead to better outcomes on privacy and online harms, sometimes more vigorous levels of competition, or interventions intended to intensify competition, can lead to a worsening of these other market outcomes. Access to consumer data, data portability, interoperability and Privacy Enhancing Technologies (PETs) are areas where privacy and competition objectives may be in tension.

The proposed coordination with relevant regulators is both welcomed and encouraged by Oxera, however, we note that the responsibility (and ability) to make these trade-offs lies mostly with the CMA. Both GDPR and the Online Safety Act are more rules-based, with limited discretion for the regulator, in comparison, the DMCCA grants the CMA broad powers enabling it to make informed trade-offs between these market failures should it choose to do so. The broad powers give the DMCCA an important role in designing future digital markets to ensure good outcomes.

Overall conclusion

The draft guidance provides useful guidance on the procedural aspects of the DMCCA. In particular, the guidance helpfully sets out the process that the CMA will follow when undertaking an SMS investigation, designing CRs or undertaking a PCI investigation. The guidance is more limited, however, when it comes to explaining how the CMA will assess whether a firm has 'substantial' market power, when and how it will intervene in relation to open choices, and trust and transparency, and how it will balance the trade-offs it is likely to face, including in relation to proportionality and between its specific objectives (of fair dealing, open choices, and trust and transparency) and other market failures (online harms and privacy).

The more clarity the CMA can provide in terms of what it is seeking to achieve, the better firms can proactively comply with the DMCCA when designing products and services, and the greater the potential impact of the DMCCA.

In the text below, we provide several more detailed observations about how this clarity can be brought to the draft guidance. We have structured these comments according to the relevant guidance chapter.

1.1 Substantive SMS assessment

1.1.1 The relationship between substantial (and entrenched) market power and dominance

While we understand that the CMA does not want to constrain itself from being able to intervene where it considers it must, particularly given the context of dynamic and evolving digital markets, we consider that the draft guidance provides insufficient clarity as to how the CMA intends to practically assess potential SMS firms. The CMA highlights that 'substantial and entrenched market power is a distinct legal concept from that of 'dominance'';¹ however, the CMA provides limited guidance as to what alternative thresholds will be adopted in relation to the 'substantial' part of the test.

The CMA refers to the types of evidence it may consider to assess the degree of market power (e.g. the level and stability of shares of supply, the number and strength of competitive constraints to incumbent firms, profitability levels and levels of customer switching), but beyond stating that 'the mere holding of market power is not itself sufficient', the CMA does not indicate the level of market power that would/could be considered substantial.² For example, what levels of customer switching, shares of supply or profitability could be considered consistent with a position of substantial market power?

We note that parallels can be drawn between the DMCCA and the telecommunications regulatory regime, specifically in terms of the objectives and motivations for the introduction of ex ante regulation. In comparison to the DMCCA, the telecoms framework is closely aligned with the legal and economic principles of competition law, and has benefitted from its ability to draw on dominance case law when assessing the significant market power (SMP) condition. We consider that such interlinkages between the regulatory and competition frameworks could also be beneficial in the context of the DMCCA. Indeed, absent clarity from the CMA as to how it interprets substantial, it may be the case that substantial is ultimately interpreted to mean 'dominance'.

Note that, in comparison, we consider the guidance on 'entrenched' to be clear (albeit strict). Drawing on the Act, the CMA highlights that its assessment will be forward-looking and will consider a period of five years (reflecting the period of SMS designation).³ Moreover, the CMA expands further and indicates that the threshold for market and regulatory developments to undermine a conclusion of entrenched market power will be high. In particular, the guidance states that:⁴

where the CMA has found evidence that the firm has substantial market power at the time of the SMS investigation, this will generally support a finding that market power is entrenched, where there is no clear and

¹CMA draft digital markets competition regime guidance, para. 2.45.

² CMA draft digital markets competition regime guidance, para. 2.42.

³ CMA draft digital markets competition regime guidance, paras 2.46–2.47.

⁴ CMA draft digital markets competition regime guidance, para. 2.52.

convincing evidence that relevant developments will be likely to dissipate the firm's market power.

1.1.2 Assessing market power for multi-sided platforms

Paragraph 2.44 of the CMA's draft guidance helpfully explains how the CMA will consider grouped digital activities, and states that:

where the CMA groups two or more of the firm's digital activities and the products within them into a single digital activity, the SMS assessment will relate to the grouped activity as a whole. In practice the CMA may consider evidence relevant to market power of individual products and whether and how interlinkages between these may contribute to market power across the digital activity, for example whether the firm's position in one activity in the group reinforces its position in another.

In comparison, the CMA's draft guidance does not make any references to multi-sided platforms and therefore provides no explicit guidance as to how the CMA will conduct an SMS investigation into firms with such business models. In particular, the CMA does not explain how it will assess market power of multi-sided platforms and whether it will consider market power on each side of the platform separately or collectively, or whether this will depend on the case in hand.⁵

Providing such guidance will ensure that potential SMS firms are able to provide appropriately targeted submissions to the CMA and allow for a more efficient SMS investigation.

1.1.3 The definition of digital activity

The definition of digital activity is very broad. Paragraphs 2.7–2.9 of the draft guidance repeat Section 3(2) of the DMCCA and provide little additional clarity on the activities which could be within scope of SMS investigations. As such, when considered alongside the turnover condition, there is a long and varied list of firms which could potentially be within scope of the DMCCA regulation.

Based on the turnover threshold and the broad definition of a digital activity in the DMCCA,⁶ large 'traditional' firms but with some online

⁵ In comparison, the European Commission's <u>Revised Market Definition notice</u> includes a new section setting out how it will define markets in the context of multi-sided platforms.

 $^{^{6}}$ Section 3(2) of the DMCCA defines digital activities as: (a) the provision of a service by means of the internet, whether for consideration or otherwise; (b) the provision of one or more pieces of digital content, whether for consideration or otherwise; (c) any other activity carried out for the purposes of an activity within paragraph (a) or (b).

service offering may find themselves within scope of a potential SMS investigation. As an illustration, Santander, would meet the turnover threshold.7

Many technology firms, including business-to-business software firms and AI firms, could also find themselves above the turnover threshold and within scope of the broad definition of digital activities. For example, as of 2023, there are at least 19 tech firms with more than \$60bn (£46.5bn) in annual revenue globally.⁸ Public services such as the NHS, HMRC and the BBC (all of which have websites and apps) could all also theoretically be within scope of the regulation.

1.2 **Conduct requirements**

1.2.1 Additional clarity over what 'good' looks like could facilitate greater compliance

According to Section 19(5) of the DMCCA, the CMA may (only) impose a CR or a combination of CRs on a designated undertaking if it considers that it would be proportionate to do so for the purposes of one or more of the following objectives set out in the DMCCA:

- (a) the fair dealing objective,
- (b) the open choices objective, and
- (c) the trust and transparency objective.

The CMA is then able to impose rules of one of 13 permitted types listed in Sections 20(2) and 20(3).

The objectives set out in the DMCCA are very high-level and, arguably, novel. The 13 permitted types of CR provide some additional clarity, but mostly in relation to fair dealing. Providing greater clarity on how the CMA intends to interpret these objectives would allow for more effective self-monitoring and self-regulation by potential SMS firms, because firms would have a better understanding of what is expected of them.

Fair dealing

The 13 permitted types of CR provide some useful additional clarity as to the 'fair dealing' objective, as often the ones that appear to apply to the fair dealing objective are self-explanatory-for example, the

Santander's annual revenue for all operations in 2023 was €57.65bn globally, more than double

the global turnover threshold. See Santander (2024), <u>'2023 Annual Report</u>', p. 348.

Based on the Fortune Global 500 2023.

requirement to have effective processes for handling complaints and the requirement to give explanations and a reasonable period of notice to users or potential users before making changes that are likely to have a material impact on users or potential users.

One of the permitted types of CR requires the SMS firm to 'trade on fair and reasonable terms' and one of the restrictions is to prevent the SMS firm from applying discriminatory terms.⁹

There is a wide literature covering these terms under FRAND cases. It would be useful if the CMA could comment on whether it will interpret these terms in a similar way in the context of its enforcement of the DMCCA. Doing so will help potential SMS firms understand what is expected of them and evaluate their conduct appropriately.

Open choices objective

Section 19(7) sets out that:

The open choices objective is that users or potential users of the relevant digital activity are able to choose freely and easily between the services or digital content provided by the undertaking and services or digital content provided by other undertakings.

Determining what is considered sufficiently 'open' can be open to interpretation. For example, does an operating system need to list every browser a consumer could choose or just the most popular ones? How often does the choice need to be revisited? At some point, openness can lead to choice overload and prompt fatigue, as seen with cookie banners and selection of privacy settings.

Guidance on how the SMS-designated firm should test competing designs would be helpful in reducing a lot of back and forth between SMS-designated firms and access seekers.

Providing greater clarity on this would help firms to comply with the regulation, and encourage self-regulation and monitoring.

⁹ Section 20(2) of the DMCCA.

Trust and transparency

Section 19(8) sets out that:

The trust and transparency objective is that users or potential users of the relevant digital activity have the information they require to enable them to (a) understand the services or digital content provided by the undertaking through the relevant digital activity, including the terms on which they are provided, and (b) make properly informed decisions about whether and how they interact with the undertaking in respect of the digital activity.

Both trust and transparency are important drivers of how consumers behave in digital markets. Like financial services, digital products can be very complex and have a long list of terms and conditions which are not always transparent and need to be communicated effectively. Equally, security and privacy are important aspects of competition in digital markets which can lead to consumers trusting certain brands and suppliers.

However, as the CMA has recognised, high levels of trust can be associated with customers who do not switch regularly¹⁰ and high amounts of formal disclosure do not necessarily lead to more engaged customers.¹¹

The guidance on the DMCCA could be usefully expanded to help firms and advisers understand when the CMA will view trust as an indicator of satisfaction and when a lack of switching would be problematic.

On transparency, more guidance on what good looks like in terms of testing of different online choice architectures and product disclosure mechanisms would be welcomed.

1.2.2 How to trade off business and consumer interests

In imposing CRs, the CMA needs to consider the proportionality of the CR(s) imposed. Paragraph 3.31 of the draft guidance sets out the following effects that may be included in the CMA's assessment of the proportionality of a CR:

¹⁰ See, for example, CMA (2018), 'Tackling the loyalty penalty: Response to a super-complaint made by Citizens Advice on 28 September 2018', para. 11.

¹¹See, for example, CMA (2022), 'Online Choice Architecture: How digital design can harm competition and consumers Discussion Paper', para. 5.8.

- Effects on the SMS firm (incl. changes to technical systems/business model)
- Effects on third parties, incl. those resulting from changes third parties may need to make to benefit from the CRs
- Effects on consumers and business users, incl. loss of benefits generated by the conduct
- Wider effects incl. market distortions or unintended consequences and implications for the CMA (e.g. costs of monitoring)

The CMA's ability to consider countervailing benefits is an important feature of the DMCCA, as it allows the CMA to make important tradeoffs between different market participants and with other market failures. However, it is important for stakeholders to understand how the CMA intends to measure Countervailing Benefits Exemptions (CBEs) and consider when a CR or PCI is, on balance, not proportionate. Without further clarity, assumptions—which may not be correct—will have to be made by firms, consumer organisations and advisers about how the CMA will make these important trade-offs.

For example, at the moment, it is unclear how the CMA will balance the interests of business consumers and end-users given that the two are not always aligned. This is particularly important in a fast-evolving market which has the capacity to introduce new features or subservices to end-consumers quickly through changes to the status quo. However, this can be at odds with the interests of business users who benefit from the status quo or prefer a change that advantages themselves as opposed to the optimal change for the end-consumer. For example, introducing more video content on search pages when this aligns with users' preferences can lead to complaints from business users who do not have video content available. At the moment, it is unclear how the CMA will trade off the different interests, both from a static and a dynamic perspective (e.g. weighting short-term versus long-term effects).

1.3 Interaction with other areas of digital policy

Decisions over the design of CRs and PCIs have the potential to influence the structure of markets and the outcomes they generate for many years to come. The wide powers given to the CMA as part of the DMCCA allow the CMA to design CRs and PCIs that give more or less weight to issues consumers care about such as privacy and online harms.

While the DMCCA, by definition, focuses on addressing the potential issue of market power in digital markets, it is well documented that digital markets can also suffer from other market failures, including privacy (e.g. asymmetric information and behavioural biases) and online harms (e.g. negative externalities). These market failures are often dealt with via other legislation, such as GDPR, regulated by the ICO, and the Online Safety Act, enforced by Ofcom.

Section 107 of the DMCCA requires the CMA to coordinate with the other relevant regulators where intervention via the DMCCA may have 'concurrent functions' with another regulator, or where intervention by the CMA is likely to have a 'material adverse effect' on the ability of another regulator to exercise its functions.

Oxera welcomes this coordination with other regulators, as it allows for important trade-offs to be made between the different market failures. However, the ability to make these trade-offs may ultimately lie mostly with the CMA. In particular, both GDPR and the Online Safety Act impose specific rules which limit the discretion of the respective regulators in enforcing the regulation. In comparison, the DMCCA sets high-level objectives which grant the CMA greater discretion to make informed trade-offs between market failures, should it choose to do so.

Given the importance of the role that the CMA is likely to play, it would be useful if the CMA's guidance could provide more detail on where and when it will consider the trade-offs between different market failures, and if so, how and when these other objectives will fit into its decisionmaking process on designing CRs and PCIs.

About Oxera

Oxera is one of Europe's leading economics consultancies. Since our founding in 1982, we have played a critical role in regulatory debates such as through our seminal study on quantifying damages for the European Commission, as well as regular engagement with policymakers through the Oxera Economics Council.

Today, we advise law firms, authorities, corporations, governments and courts in Europe and beyond on merger reviews, public/private antitrust investigations, regulation and state aid enforcement from our offices across Europe.

Our work in digital markets covers competition, data access, data valuation, privacy, cryptocurrencies, algorithms and the responsible use of AI.

